No. 16-1023

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, ET AL.,
Appellants,

v.

SANDRA LITTLE COVINGTON, ET AL.,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OPPOSING MOTION TO AFFIRM

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BRIEF OPPOSING MOTION TO AFFIRM

Plaintiffs still have not identified anything that makes this the extraordinary case in which a *Shaw* violation cannot be remedied simply by ordering new maps before the next regularly scheduled election. Instead, they just emphasize the discretion courts enjoy in fashioning equitable remedies, while conspicuously refusing to acknowledge any limits on that discretion or even any framework to guide its exercise. At bottom, plaintiffs' position is that special elections are *always* appropriate remedies for *Shaw* violations, notwithstanding the harms they inflict on state sovereignty. Indeed, plaintiffs even go so far as to claim the district court was *required* to order a special election, notwithstanding that the remedy in every one of this Court's *Shaw* cases has been limited to ordering new plans for the next regularly scheduled election.

Plaintiffs take the same anything-goes approach regarding the district court's lack of jurisdiction to issue the remedy, insisting that a court is free to ignore the rule divesting it of jurisdiction as long as it announces its intention to keep its options open in advance. But plaintiffs do not cite a single case suggesting that courts can expand their jurisdiction by their own say-so. To the contrary, even their own authorities uniformly hold that once a notice of appeal is filed, district courts retain the power to *implement* unstayed injunctions, but lose the power to interfere with the appellate function by ordering *new* remedies. The district court here unquestionably did the latter, and the fact that this appeal now encompasses two fully briefed

jurisdictional statements sandwiched around an emergency stay application proves the wisdom of the rule the district court ignored. Finally, as the first of those jurisdictional statements explained, there is no underlying constitutional problem for the court to remedy in the first place.

At bottom, the district court lacked jurisdiction to order special elections, made no meaningful effort to justify them, and erred at the outset in finding a constitutional violation. Accordingly, the special-election order cannot stand.

I. The District Court Lacked Jurisdiction To Issue The Special-Election Order.

Plaintiffs do not dispute the general rule that "only one court at a time has authority in a case." *Blue Cross & Blue Shield Ass'n v. Am. Express Co.*, 467 F.3d 634, 638 (7th Cir. 2006). Yet they claim that the district court exempted itself from that rule by stating in its final judgment that it "retain[ed] jurisdiction to enter such orders as may be necessary to enforce this Judgment and to timely remedy the constitutional violation." Mot.13-14; JS.App.149. But while the court might have *wanted* to exempt itself from the general rule, plaintiffs do not cite any case holding that a district court's wish is an appellate court's command when it comes to retaining jurisdiction post-appeal. Plaintiffs' failure is unsurprising, as the jurisdictional rule would be pointless if lower courts could opt out at will.

Plaintiffs fare no better in arguing that the district court retained jurisdiction because the "final remedy" remained unresolved. Mot.13-14. The same could be said of *every* case in which a court attempts

to alter the scope of relief post-appeal—any remedy ordered post-appeal is *by definition* not part of the appeal and renders the earlier relief non-final in the district court's eyes. But that just confirms that plaintiffs' preferred rule is not the law and would have untenable consequences. Indeed, were it not for this Court's stay, the special election could have largely mooted the State's appeal, while a ruling for the State on appeal could have mooted the special-election order. There are sensible reasons underlying the settled one-court-at-a-time rule of jurisdiction.

That rule is not, as plaintiffs suggest, limited to post-appeal orders that directly conflict with the issues on appeal. Mot.15. District courts lose jurisdiction over all matters within the scope of the appeal the moment the notice of appeal is filed, regardless of which issues the appellant pursues. Thus, in *City of Cookeville v. Upper Cumberland Electric Membership Corp.*, 484 F.3d 380, 384 (6th Cir. 2007), the district court lacked jurisdiction to enjoin a construction project, even though the pending appeal concerned only damages. Likewise, in *McClatchy Newspapers v. Central Valley Typographical Union*, 686 F.2d 731, 734-35 (9th Cir. 1982), the district court lacked jurisdiction to reinstate employees, even though the pending appeal concerned only liability. Here, the district court's initial final judgment imposed a remedy (a remedy that will be unnecessary should the State prevail on appeal), so the State's notice of appeal divested the court of jurisdiction to order a new one.

Neither of the cases plaintiffs cite supports their novel jurisdictional theory, as each involved

implementation of an injunction, not *expansion* of one. Mot.11-12. The order from *Alabama Legislative Black Caucus v. Alabama* (*ALBC*) does not contemplate special elections or any other relief beyond that initially ordered; it merely directs the parties to propose procedures "[f]or purposes of implementing the court's intended remedy." Order at 3, *ALBC*, No. 12-cv-691 (M.D. Ala. Jan. 20, 2017), Dkt.318.

The order in *Wittman v. Personhuballah* likewise focused on implementation. The district court's initial order prohibited Virginia from using its invalidated districting plan in future elections and required it to adopt a new plan by September 1, 2015. *Wittman*, 136 S. Ct. 1732, 1735 (2016). After the legislature failed to comply with that deadline (and while the case was on appeal to this Court), the district court appointed a special master to develop a remedial plan. *Id.* That order fell squarely within the rule allowing a district court to "take action to enforce its order," *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987), as it merely implemented the initial remedy by ensuring that no future elections would use the invalidated plan.

Finally, to the extent plaintiffs argue that the State waived its jurisdictional argument, Mot.14, they are factually and legally incorrect. The State urged the district court not to impose a special election because, among other things, doing so would interfere with this Court's appellate review. D.Ct.Dkt.136 at 8-11. And even if the State had not, this jurisdictional defect is not waivable: "Every federal appellate court has a special obligation to

'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997). Because the district court lacked jurisdiction to issue its sweeping remedial order, the order cannot stand.

II. The Extraordinary Remedy Of A Special Election Is Improper.

Jurisdiction aside, plaintiffs once again identify nothing about this case that warrants departing from the presumptive remedy for a *Shaw* violation and imposing the "drastic if not staggering" remedy of a special election. *Gjersten v. Bd. of Election Comm'rs*, 791 F.2d 472, 478 (7th Cir. 1986). Nor do they meaningfully rebut the many reasons why that remedy is particularly *un*warranted here, including that the legislature acted in good faith, the districts were upheld (twice) by the State's highest court, the alleged violation did not disfranchise voters, and the special election would work massive harms on the State and its citizens. JS22-31. Instead, plaintiffs just blithely assert that the state court proceedings upholding the same districts against the same constitutional attack were entitled to "no deference" at all, Mot.32, and resist the premise that special elections are extraordinary, Mot.16-18. Indeed, not only do they insist (contrary to reality) that special elections are routine and appropriate; they even make the remarkable claim that it would have been an "abuse of discretion" *not* to order a special election. Mot.32.

That startling position cannot be reconciled with decades of *Shaw* jurisprudence. As courts have repeatedly recognized, a special-election remedy should be reserved for "the most extraordinary of circumstances." *Gjersten*, 791 F.2d at 478. Plaintiffs disagree, warning that limiting special-election remedies to extraordinary cases could force voters to "be subjected to serious constitutional injuries for at least half a decade." Mot.29. But the only reason this case is still ongoing in 2017 is that state litigation went forward first and plaintiffs waited more than *four years* to bring a federal suit. Once they actually initiated litigation, the case proceeded from complaint to trial in less than one year. Mot.29. Accordingly, when plaintiffs timely file and expeditiously litigate meritorious *Shaw* claims, there is little reason to worry about unconstitutional districts lingering for multiple election cycles.

Plaintiffs claim that several courts have ordered special elections "in circumstances similar to those presented here." Mot.26-27. But besides *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996), which the State noted and distinguished in its jurisdictional statement, JS18 n.4, none of their cases (all of which are over 30 years old) is remotely "similar" to this one. They all pre-date *Shaw*, most involve malapportionment, and the violation in each was purposeful or indisputable. Here, by contrast, the legislature acted in good faith and the districts were twice upheld against state and federal constitutional attack. JS23-24.

As for *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996), the remedial order there bears no resemblance

to the sweeping order in this case either. There, after this Court invalidated the State's congressional districts, the district court ordered that the next round of elections be held under a court-imposed districting plan. *Id.* at 1342. Although the court curiously used the term "special election," it did not change the election date, unseat elected legislators, or alter residency requirements enshrined in the state constitution. Moreover, even though there was "virtually no disagreement among the parties or *amici* that ... new districts c[ould] be employed in the [next] elections," *id.* at 1347, the court supported its order with a comprehensive opinion that carefully considered all the equities, *id.* at 1347-52. In both function and form, the remedial order in *Vera* stands in sharp contrast to the lightly reasoned special-election order in this case.

Indeed, while plaintiffs spend several pages purporting to defend the district court's "equitable balancing," the vast majority of the language they quote is from the court's *initial* memorandum opinion—in which it correctly concluded that the 2016 elections should proceed as scheduled. Mot.18, 20-21. The court's subsequent special-election order, by contrast, devotes a total of two sentences to discussing whether a special election is an appropriate remedy. Mot.18-19. That meager analysis is no substitute for the careful "equitable weighing process" this Court's precedents require. *NAACP v. Hampton Cty. Election Comm'n*, 470 U.S. 166, 183 n.36 (1985).

Unable to reconcile the district court's cavalier approach with the factors other courts have considered, plaintiffs accuse the State of

manufacturing those factors out of whole cloth. Mot.24-25. But there is no denying that the few courts to order special elections have done so only to cure egregious violations that affect election outcomes, and even then only if a special election's benefits outweigh its considerable costs. JS19-22. Plaintiffs protest that (as the jurisdictional statement acknowledges, JS19) *this* Court has yet to embrace those factors, but that is only because special elections are so rare that the Court has no occasion to weigh in on when they might be warranted.

Plaintiffs contend that those factors "conflict with each other." Mot.25. Not so. While one can hypothesize a hapless but fully intentional violator, voters are packed or cracked not for sport, but to impact election results. Thus, most egregious or bad-faith violations will affect election results; indeed, some of plaintiffs' own authorities fit that description perfectly. *See, e.g., Cousins v. City Council of Chicago*, 503 F.2d 912, 914 (7th Cir. 1974) ("purposeful" racial discrimination changed "a black majority ... into an overwhelmingly white majority"); *Keller v. Gilliam*, 454 F.2d 55, 55-56 (5th Cir. 1972) (extreme malapportionment allowed 27% of the population to "control the entire county government"); *see also Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

Moreover, even if those factors were in any tension, plaintiffs fail to show that *either* is satisfied here. First, their argument that the alleged violation was "egregious" is premised on a mistaken interpretation of *ALBC*, as this Court just reiterated that *ALBC* does not "condemn the use of BVAP targets ... in every instance." *Bethune-Hill v. Virginia*

State Bd. of Elections, No. 15-680, Slip op.16 (U.S. Mar. 1, 2017). Furthermore, plaintiffs do not even address the district court's narrow-tailoring analysis, which is where that court went furthest astray by concluding that the State lacked "good reasons" to draw *any* majority-minority—or even cross-over or coalition—districts *anywhere* in the State. JS.App.179-96. As for election results, plaintiffs assert that candidates in challenged districts were unopposed only because of the purported gerrymander, Mot.26, but they have never even attempted to prove that assertion. And even if they were right, they still do not claim that any of the challenged districts (which they agree should be drawn as ability-to-elect districts) would actually elect the Republican candidate under a remedial map.

Perhaps recognizing that reality, plaintiffs emphasize that the harms caused by racial gerrymandering extend beyond election results. Mot.26. That may well be true, but the remedy that cures the expressive harms to which plaintiffs refer is the remedy the district court initially ordered—*i.e.*, a judicial declaration of unconstitutionality and the enactment of new districts based on traditional districting principles. Plaintiffs never explain why that remedy does not suffice here, or what benefits a special election would bring that would justify the extraordinary incursion on state sovereignty it entails.

Instead, plaintiffs just disparage the harms the special-election order inflicts on North Carolina's sovereignty. Mot.30-35. But contrary to plaintiffs' imagined arguments, the State never claimed that "adherence to the federal Constitution must be

delayed to accommodate ancillary provisions of state law," or expressed any confusion about how the Supremacy Clause works. Mot.30-32. If there really is a racial gerrymander here, the State will remedy it. But the Constitution does not guarantee a right to a special election, and it certainly does not do so when a less intrusive remedy cures the violation just as well.

That is why this Court has repeatedly instructed courts choosing among possible remedies for districting violations to avoid intruding "upon state policy any more than necessary." *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971); *see also Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("[C]ourts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible."). Where, as here, the presumptive remedy for a *Shaw* violation would be equally effective as a federalism-obliterating special election that unseats legislators from unchallenged districts and abrogates multiple provisions of the state constitution, choosing the latter option "is not required by the Federal Constitution and is not justified as an exercise of federal judicial power." *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 200 (1972).

III. There Was No Constitutional Violation To Remedy, Especially In Light Of This Court's Decision In *Bethune-Hill*.

This Court also should vacate the special-election order because there was no constitutional violation to remedy in the first place. JS31-34. That is even clearer after this Court's recent opinion in *Bethune-Hill*, which provides additional guidance on how courts should apply strict scrutiny in racial

gerrymandering cases. At least two aspects of that opinion cast even further doubt on the decision below.

First, as noted, *Bethune-Hill* clarified that this Court's decision in *ALBC* does not "condemn the use of BVAP targets ... in every instance." Slip op.16. While Alabama's use of BVAP targets as high as 70% was impermissible, *Bethune-Hill* explained that Virginia's 55% BVAP target was appropriate to ensure that minority voters had "a functional working majority." *Id.* The district court in this case, by contrast, read *ALBC* as holding that a State's districting plan *never* is narrowly tailored if it relies on a "mechanically numerical" BVAP target, JS.App.138, and it repeatedly faulted the State for using a "50%-plus-one target" in drawing district lines, JS.App.140.

Second, *Bethune-Hill* marks the first time this Court has held that a State's use of race in drawing district lines satisfied strict scrutiny. While this Court had set out the "strong basis in evidence" standard in past cases, *Bethune-Hill* provides the first concrete example of a "functional analysis" that satisfies the standard. Here, the North Carolina legislature conducted an analysis of voting conditions that is at least as robust as the analysis conducted by the Virginia legislature, yet the court below concluded that it nonetheless lacked a "strong basis in evidence" to draw majority-minority—or even cross-over or coalition—districts *anywhere in the state.* JS.App.183-93. That conclusion simply cannot be squared with the strict scrutiny analysis in *Bethune-Hill*, providing yet another reason to summarily reverse the merits decision below. At an absolute minimum, this Court should hold the jurisdictional statements pending this

Court's upcoming decision in *Cooper v. Harris*, No. 15-1262, and then note probable jurisdiction, vacate, and remand both the merits decision and the remedial decision for further consideration in light of *Harris* and *Bethune-Hill*.[1]

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[1] Plaintiffs implore the Court to note probable jurisdiction instead of holding and/or remanding, and to order merits briefing and argument on an extraordinarily expedited schedule to avoid "intolerable delay." Mot.36. But their suggestion that the State is trying to "run[] out the clock," Mot.3, is wholly unjustified. In fact, the State, mindful of the time constraints, volunteered almost three months ago in its stay application to brief and argue this case on an expedited schedule. The State also expedited completion of briefing on its merits-stage jurisdictional statement to ensure that the Court could note probable jurisdiction in time to hear argument this Term should it be so inclined. The Court having twice declined the opportunity to order merits briefing and argument this Term, it would make little sense to now order the parties to brief and argue the case in a matter of weeks.

CONCLUSION

The district court's merits decision should be summarily reversed and its special-election order should be vacated. In the alternative, the Court should note probable jurisdiction, vacate, and remand for further consideration in light of *Harris* and *Bethune-Hill*.

Respectfully submitted,

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